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No. 84-1607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTH EAST INDEPENDENT SCHOOL DISTRICT
AND R.E. WINDHAM,

Petitioners,

V.

CHARLES FINDEISEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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ARGUMENT

I.
THE ISSUE IS TOO NARROW TO WARRANT REVIEW BY THIS COURT ON CERTIORARI

The questions presented in the Petition for Writ of Certiorari turn on the particular facts of this case alone and are

of interest only to the parties to it. The facts of this case are unusual and unlikely to recur.

The best rendition of the facts of this case are in the opinion of the Court below. In the Petition for Writ of Certiorari in the Statement of the Case, Petitioners have omitted some critical facts and inaccurately stated other facts. Sufficient contested issues of fact were alleged in the pleadings and listed in the Pre-trial Order to impact on the facts that were undisputed in the Pre-trial Order. As the Trial Court dismissed this case by summary judgment in Petitioners' favor, no findings of fact nor answers to jury issues yet exist to provide a definitive factual picture.

Specifically, Petitioners omitted the fact that Respondent held a Texas Teacher Certificate in Science Composite, Physical Science, Biology and Chemistry. Petitioners also omitted the fact that Petitioner, R. E. Windham, the personnel director wrote Respondent on January 12, 1981 that if the math credits were not completed, Respondent would be assigned to teach in science, but not necessarily at Churchill, depending on where science vacancies occurred. (Pre-trial Order, p. 4). Petitioners also omitted the last sentence of the personnel director's letter accepting the purported resignation of Respondent which was, "If a science position opens in the District, we will consider you along with other applicants."

Petitioners inaccurately state (Petition for Writ of Certiorari, p. 10) that Respondent alleged that Petitioner, Windham directed that the memo should request placement into a science position, "if one was open." The record does not reflect this wording. The actual contingent resignation memo talks about a science position becoming available. There is more than a difference in semantics between a position that is open and a position becoming available.

Respondent alleged that Petitioners treated the contingent resignation as an outright resignation despite the availability of a science position occurring subsequent to the date of Respondent's contingent resignation and prior to the date of the school district's acceptance. It is this allegation which is the basis for Respondent's claim of constructive discharge. Respondent's allegation is significant regarding the issues of Petitioners' lack of good faith and misuse of power.

II.
NO CONFLICT WITH EXISTING LAW

The allegedly "conflicting" decisions relied upon by Petitioner are distinguishable on their facts. *Dusanek v. Hannon*, 677 F.2d 538 (7th Cir. 1982) cert. denied 459 U.S. 1017 (1982) involves coercion and an outright resignation whereas the instant case involves coercion and a contingent resignation where the contingency never occurred and where the contingency was ignored by the personnel director and the school district. Respondent contends that he did not resign as the contingency never occurred. Respondent's pleadings do not charge that the coercion was the basis for constructive discharge, but rather that by ignoring the contingency and fabricating a resignation, Petitioners constructively discharged Respondent.

Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d 1435 (7th Cir. 1983), affirmed by an equally divided court ____ U.S. ____, 104 S.Ct. 2144 (1984) involves a non-tenured teacher whereas the instant case involves a tenured teacher. A distinction based on tenure is critical in an area of the law that bases property rights on tenure. Even Judge Posner (on whose dissent Petitioners rely) in *Vail* states, "The Supreme Court has never equated tenure with nontenure contracts . . . ." 706 F.2d at 1452. In addi-

tion, Judge Posner pointed out that the distinction between tenure as property and a mere contract right cannot be eliminated. 706 F.2d at 1451.

III.
THE COURT BELOW MERELY ADOPTED A LONG-RESPECTED DOCTRINE

The Court below adopted the line of cases starting with *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). Petitioner's contention that *Roth* does not apply on the facts of this case would alter an entire body of law that has developed from *Roth* and *Sindermann*. Petitioner's contentions would create confusion and chaos in the law.

CONCLUSION

For the reasons set forth above, Respondent requests that a writ of certiorari not be granted in this case.

Respectfully submitted,

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